

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COMMUNITY TRANSIT,)	
)	No. 62516-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
DON HERRON,)	
)	
Appellant,)	
)	
and)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF LABOR AND)	
INDUSTRIES,)	FILED: July 26, 2010
Defendant.)	

Grosse, J. — The claimant has not provided a sufficient record to review his challenge to the superior court's jurisdiction over this industrial insurance appeal. And the superior court's findings that the claimant's symptoms were not caused by his employment are supported by substantial evidence. We affirm.

FACTS

Don Herron was diagnosed with diabetes mellitus in the 1970s. He has treated his condition with insulin, but over the years it has caused extensive nerve damage in his extremities, particularly in his feet.

Herron began employment with Community Transit as a bus driver in the mid-1990s. In July 2004, he experienced a sudden onset of intense pain in his right foot while driving his bus. Herron discontinued work for several months and received treatment, including rest, cortisone injections, and use of a soft cast.

The symptoms resumed, however, when he returned to work. During Herron's diagnosis and treatment, a formerly undetected tumor was found in his foot at the location of the pain.

In 2005, the Department of Labor and Industries (Department) issued an order finding Herron sustained an injury or occupational disease caused by his employment with Community Transit. Community Transit thereafter filed a notice of appeal with the Board of Industrial Insurance Appeals (Board). An Industrial Appeals Judge (IAJ) issued a proposed decision and order allowing Herron's claim as an industrial injury. Community Transit filed a petition for review of the IAJ order to the Board. The Board denied the petition. Community Transit then filed a notice of appeal to the Snohomish County Superior Court.

After a de novo review based on the Certified Appeal Board Record (CABR), the superior court found by a preponderance of the evidence that Herron's condition was not the result of an industrial injury or occupational disease. The court accordingly reversed the Board's denial of Community Transit's petition for review and remanded the case to the Department to issue an order denying Herron's claim for benefits.

Herron appeals.

ANALYSIS

In industrial insurance cases, the superior court conducts a de novo review of the Board's decision, relying exclusively on the CABR.¹ The Board's findings

¹ RCW 51.52.115; Gallo v. Dep't of Labor & Indus., 119 Wn. App. 49, 53, 81 P.3d 869 (2003), aff'd, 155 Wn.2d 470, 120 P.3d 564 (2005).

and decision are prima facie correct and the party challenging the decision has the burden of proof.² We review the superior court's decision under the ordinary standard of review for civil cases, i.e., whether substantial evidence supports the superior court's factual findings and whether the superior court's conclusions of law flow from the findings.³ Substantial evidence is evidence "sufficient to persuade a fair-minded, rational person of the truth of the matter."⁴ "Statutory construction is a question of law, which we review de novo."⁵

Preliminarily, Herron argues that we should vacate the superior court's ruling regardless of the merits because the court lacked jurisdiction over Community Transit's appeal. While Herron made no such argument in the superior court, a party may challenge superior court jurisdiction for the first time on appeal.⁶ But an appellant still has the burden of producing a record from which the appealed issues can be decided.⁷ An insufficient record precludes review of the assigned error.⁸ That is the case here.

Herron contends that the superior court lacked jurisdiction for two reasons. First, because the superior court's findings of fact state that Community Transit

² Gallo, 119 Wn. App. at 53-54.

³ RCW 51.52.140; Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

⁴ R&G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (2004).

⁵ Department of Labor & Indus. v. Granger, 130 Wn. App. 489, 493, 123 P.3d 858 (2005).

⁶ RAP 2.5(a)(1).

⁷ Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994); Brothers v. Pub. Sch. Employees of Wash., 88 Wn. App. 398, 409, 945 P.2d 208 (1997); RAP 9.2(b).

⁸ Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984).

filed its petition to the Board more than 20 days after the IAJ's order issued and the CABR in the clerk's papers contains no document showing Community Transit obtained an extension of time in which to file its petition, Herron argues the petition was untimely under RCW 51.52.104. He therefore argues that neither the Board nor the superior court had jurisdiction to rule on the merits of Community Transit's appeal.

Herron also contends that after the Board upheld the IAJ's order, Community Transit failed to timely serve the Board with its notice of appeal to superior court under RCW 51.52.110. He again relies on the lack of any document in the CABR proving timely service to support this claim.

As Community Transit argues, however, it is clear that the version of the CABR that Herron provided to this court for our review is not the version considered by the superior court and does not include all documents in that record.⁹ Accordingly, the absence of any motion, order, or other document from the partial CABR before us does not establish that such a document does not exist.¹⁰ And while Herron also refers to a particular declaration of service as

⁹ Herron has provided only a partial transcript of the superior court trial, limited to the court's oral decision. But the court noted during its oral ruling that many documents from another claimant's file were apparently erroneously included in Herron's CABR. There are no such materials in the CABR now before this court. Moreover, this CABR's cover sheet suggests it is only a partial version limited to "a corrected copy of the transcripts and depositions" from Herron's file. The CABR before us not only contains no document relating to an application to extend time, it also does not contain the IAJ's proposed decision and order, Community Transit's petition for review, or even the Board's decision upholding the IAJ's ruling, all of which obviously existed.

¹⁰ We express no opinion on whether the absence of such documents from a complete CABR would necessarily establish a jurisdictional defect of the type Herron claims.

supposed support for his claim that Community Transit untimely served its notice of appeal on the Board, Community Transit correctly objects that there is no such document in the limited record Herron has provided to this court for review.¹¹

In his reply, Herron changes his jurisdictional argument by asserting that all documents necessary to establish jurisdiction should have been attached as exhibits to Community Transit's trial brief in the superior court. Coming for the first time in reply, this argument is too late.¹² Moreover, Herron cites no authority supporting this novel claim, and in any event, also failed to designate Community Transit's trial brief as part of the record transmitted to us.

Next, Herron assigns error to the superior court's findings that his symptoms were not the result of an industrial injury or occupational disease. The fact-finder in the superior court trial may, however, properly enter findings contrary to the Board's determination if convinced the evidence weighs in that direction.¹³ Viewing the record in the light most favorable to Community Transit, as we must, it is clear that substantial evidence supports the findings here.¹⁴

¹¹ Without recounting the lengthy procedural history in this court of problems with the record and briefing Herron has provided, we note that after several motions, objections, and hearings addressing those topics, a commissioner of this court ruled that the appeal would proceed based on the limited record Herron initially provided and that "[i]f that record is inadequate to allow full review of the issues raised by appellant, then appellant will bear the consequences of providing an inadequate record on appeal." Herron did not move to modify that ruling.

¹² Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

¹³ Gaines v. Dep't of Labor & Indus., 1 Wn. App. 547, 550, 463 P.2d 269 (1969). We disregard Community Transit's citation to an unpublished opinion of this court in its response to this portion of Herron's argument. GR 14.1(a); Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005).

¹⁴ Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002); Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

The medical testimony before the superior court consisted of the depositions of three experts: orthopedic surgeon Dr. Thomas Skalley; neurologist Dr. Joseph Robin; and orthopedic surgeon Dr. Stanley Kopp. Dr. Skalley was Herron's treating physician, and Dr. Robin and Dr. Kopp conducted independent medical examinations. In rendering its detailed oral decision, the superior court properly gave special consideration to Dr. Skalley's opinion as Herron's treating physician. But the court also explained why it found the opinions of Dr. Robin and Dr. Kopp more credible, and why it concluded that the Board's decision was incorrect.¹⁵

The Board had allowed Herron's claim by finding a work-related injury it defined as a partial tear in tendinopathy of the peroneus longus and brevis tendons. The superior court, however, found it highly significant that Dr. Skalley testified that Herron had "chronic right peroneal tendonosis versus a peroneal tendon tear with tenosynovitis." From this, the court understood that Dr. Skalley did not actually diagnose a tendon tear, and because the other doctors found no tear, the court justifiably concluded that the Board's finding lacked evidentiary support. Moreover, Dr. Skalley effectively acknowledged that Herron's tumor could have caused the condition he did diagnose. And when pressed on cross-examination about whether, more probably than not, Herron's work as a bus driver caused the condition, Dr. Skalley equivocated: "So I guess on a more probable than not basis, his symptoms began that day driving a bus." In contrast, Dr. Robin

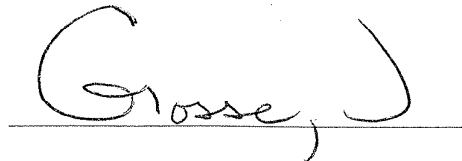
¹⁵ Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988); Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 45, 395 P.2d 633 (1964); Young, 81 Wn. App. at 128-29.

and Dr. Kopp unequivocally opined that Herron's symptoms were caused by his diabetes and tumor, and were unrelated to his work, notwithstanding the symptoms first occurred on the job.

Because we do not reweigh the superior court's assessment of this evidence, we reject Herron's challenge to the court's substantive findings.

Finally, Herron contends that the superior court's decision was contrary to the law because the court accepted Herron's testimony that his pain began when he activated the air brakes on his bus. But contrary to Herron's contention, the court correctly applied the long-recognized statutory requirement of "a causal relationship between the happening and the result."¹⁶ The court did not err because it justifiably found that there was no such relationship, notwithstanding Herron's testimony as to the timing of the events.

We affirm the superior court.

A handwritten signature in cursive script, appearing to read "Grosse", is written over a horizontal line.

WE CONCUR:

¹⁶ Petersen v. Dep't of Labor & Indus., 40 Wn.2d 635, 638, 245 P.2d 1161 (1952) (emphasis omitted).

Sperry, J.

Appelwick, J.